

ATCO Gas North ATCO Gas South

Request for Exemption from Certain
Provisions of the *Gas Utilities Act Code of
Conduct Regulation*

November 25, 2003

ALBERTA ENERGY AND UTILITIES BOARD

Decision 2003-093: ATCO Gas North, ATCO Gas South

Request for Exemption from Certain Provisions of the *Gas Utilities Act Code of Conduct Regulation*

Application No. 1314506

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ALBERTA ENERGY AND UTILITIES BOARD

Calgary Alberta

**ATCO GAS NORTH, ATCO GAS SOUTH
REQUEST FOR EXEMPTION FROM CERTAIN
PROVISIONS OF THE *GAS UTILITIES ACT CODE*
OF CONDUCT REGULATION****Decision 2003-093
Application No. 1314506
File No. 6640-194****1 INTRODUCTION**

ATCO Gas filed an application (the Application) with the Alberta Energy and Utilities Board (the Board or EUB) on September 30, 2003 for an exemption from certain provisions of the *Code of Conduct Regulation*¹ (*Gas Code Regulation*) under the *Gas Utilities Act* (GUA). ATCO Gas filed the Application pursuant to section 41(1)(a) of the *Gas Code Regulation*. The same application was also filed with the Market Surveillance Administrator (MSA) on behalf of ATCO Electric Ltd. (ATCO Electric) under section 43(1)(a) of the *Code of Conduct Regulation*² (*Electric Code Regulation*) under the *Electric Utilities Act* (EUA) for a similar exemption. The application pursuant to the *Electric Code Regulation* will be referred to as the Electric Application. It and the Application will be jointly referred to the Applications. Where necessary, ATCO Gas and ATCO Electric are referred to jointly in this Decision as ATCO.

Due to the related nature of the two Applications filed with the Board and the MSA, each regulator determined that it was appropriate to subject the Applications to a joint process. To that end, a joint public notice of the Application and the Electric Application was published on October 10, 2003 (Notice). The Notice set out the process and schedule to be followed in reviewing the Applications. Because the request for disclosure of information was divided into two Phases in the Applications (described more fully below), the Notice invited parties to object to either or both Phases. The Notice emphasized that while "information will be shared between the EUB and the MSA, the review and consideration of this information, and the decision in relation to each Application, will be conducted independently."

The Board and the MSA received several objections to the Applications, including some objections to both Phases. Parties then had the opportunity to ask information requests of ATCO and to provide written submissions respecting the Applications. In accordance with the schedule, the Board received a reply submission from ATCO on November 7, 2003. Accordingly, for purposes of this Decision, the Board considers the record to have closed on November 7, 2003.

2 DETAILS OF THE APPLICATION

In the Application, ATCO Gas noted that section 9 of the *Gas Code Regulation* allows ATCO Gas to release customer information without customer permission to the Default Supply Provider (DSP) appointed by ATCO Gas. However, prior to EUB approval of the appointment of Direct Energy Regulated Services (DERS) as DSP to ATCO Gas customers, there is a general

¹ AR 183/2003

² AR 160/2003

prohibition in the *Gas Code Regulation* regarding release of this information without customer consent.

ATCO Gas stated that, to date, no customer information had been provided to DERS or any affiliate of DERS. By letter dated September 9, 2003, Direct Energy Marketing Limited (DEML), on behalf of DERS and Direct Energy Partnership (DEP), requested certain customer information from ATCO Gas in anticipation of EUB approval of the appointment of DERS as the DSP for ATCO Gas. ATCO Gas advised DERS that release of this information in the manner proposed would require the exemptions that are the subject of this Application.

ATCO Gas supported the request for exemption. ATCO Gas stated that it would not be a service to customers to transition the DSP role to DERS and DEP in a manner and timeframe that would not allow them to review the quality of the data and to test the appropriate functioning of their systems.

In its request for customer information, DERS noted that it was necessary to receive actual customer information and data from ATCO Gas to test the ability of the systems to receive and process this data prior to DERS assuming responsibility for the DSP services from ATCO Gas. DERS stated that, to date, it had built and configured its gas load forecasting, trading/risk management systems, and financial management systems for its regulated business based on generic test data. DERS expected that the actual ATCO Gas regulated customer and usage data will contain data quality issues that will impact the ability of the new DERS systems to accurately segment the customer base.

DERS stated that the ATCO Gas data will be utilized by DERS to adequately test its energy management systems, including conducting rigorous load and portfolio analysis, and determining the effects of weather and other variables. DERS stated that this would allow it to refine its load forecasting methods which in turn will allow it to optimize its supply portfolio.

The specific customer information requested by DERS is identified in its September 9, 2003 letter to ATCO, which forms part of the Application. The specific data requested for gas customers is included in Appendix A to this Decision. DERS made its request for information in two phases as described in Appendix A. DERS stated that it was not seeking the information to assist in its marketing efforts. DERS and DEP, through DEML, offered to provide written representation that it will maintain all ATCO Gas customer information and data as strictly confidential. DEML committed to the following steps to ensure the confidentiality of the information:

1. The ATCO Gas customer data will be provided by ATCO to the Vice-President, Regulatory Affairs at DEML. The Vice-President of Regulatory Affairs will control access to the customer data by employees and contractors of DERS and DEP.
2. DERS and DEP requested the minimum information it considered necessary to adequately test its systems. No customer names are requested. The Site ID could be used to identify a customer; however the individual employees of DEML who will have access to the data will undertake in writing that they will not do this under any circumstance.
3. DEML will store and maintain the data on a stand alone computer server in a Oracle 9i database.

4. The data will be password protected and each individual authorized by the Vice-President, Regulatory Affairs to have access to the data will have a unique password. The individuals authorized to have access will be restricted to individuals who work in the following roles: Energy Management Group Gas Forecasting, Information Systems and Finance.
5. A log of individuals who are given access to the ATCO Gas data will be created and provided to the Board every two weeks. The log will contain the individual's name, work group and reason for accessing the data.
6. All individuals who are provided with access to the ATCO Gas customer data by the Vice-President, Regulatory Affairs will be required to execute a written undertaking that they will not provide data to any other individual within or outside DEML.

DERS and DEP requested that the information be released in two Phases as follows:

- Phase 1. Customer information is released by ATCO to DERS and DEP with the Site ID scrambled or altered to preserve customer anonymity. Scrambling or altering of the Site ID will be accomplished by ATCO utilizing a secret computer algorithm.
- Phase 2. No earlier than November 1, 2003, ATCO will provide the 'key' to the scrambling algorithm to allow DERS and DEP to obtain the true Site ID.

3 LEGISLATION AND BOARD DISCRETION

As a gas distributor within the meaning of the GUA, ATCO Gas must comply with the requirements of the *Gas Code Regulation*, which is designed to ensure that appropriate relationships are maintained among gas distributors, DSPs and their affiliated retailers, who are not regulated by the Board. The *Gas Code Regulation* also ensures that the conduct of these market participants does not result in the inappropriate sharing of information and/or resources to the ultimate detriment of customers. When it established a code of conduct for the ATCO Group of companies in Decision 2003-040, the Board expressed the following views about the purpose of an inter-affiliate code of conduct, which the Board considers to provide a useful guide:

At a high level, the Board considers that the purpose of a code of conduct is to establish clear and unambiguous standards and rules of interaction between a regulated utility and its regulated and unregulated affiliates. These standards and rules address the actual and perceived incentives arising from utility-affiliate interaction to maximize the profit of the overall corporate group in a manner that may be deleterious to the interests of utility customers.

An objective of a code of conduct is to anticipate and adjust for the potential misalignment of interest between shareholders and customers occasioned by utility – affiliate interaction by establishing parameters for transactions, information sharing and the sharing of employees and resources. These parameters seek to protect customer confidential information, prevent undue preferences or advantages, prevent cross-subsidization, and to level the playing field among comparable competitive alternatives while enabling inter-affiliate economies and efficiencies to occur.

The standards and rules of a code of conduct are intended to provide the utility with clearly defined flexibility to enter into affiliate transactions, while promoting fairness and accountability and thereby building ratepayer confidence and trust.

The Board considers that a code of conduct based on clear, equitable and sustainable standards and rules, complete with adequate compliance, audit, and dispute resolution provisions, is in the interest of the utility and all of its stakeholders. Such a code will reduce both the occurrence of protracted adversarial confrontations between the utility and its customers and the need for regulatory oversight, resulting in a "light-handed" regulatory environment in respect of these issues.³

Among the important requirements of the *Gas Code Regulation* is the obligation set out in section 9:

9 Gas distributors, default supply providers and retailers must, in accordance with this Regulation, protect the confidentiality of customer information.

In furtherance of this obligation, section 10 of the *Gas Code Regulation* places specific restrictions on the disclosure by a gas distributor of customer information without the customer's consent:

10(1) Neither a gas distributor or default supply provider nor a retailer, nor an officer, employee, contractor or agent of any of them, may disclose customer information to any person without the consent of the person that is the subject of the information unless

- (a) the information is aggregated customer information disclosed in accordance with section 14,
- (b) the disclosure is solely for the purpose of preventing interruption of gas services or gas distribution service, or
- (c) the disclosure is permitted under subsection (3).

None of these exceptions apply to ATCO Gas in the circumstances. Accordingly, to be authorized to disclose any customer information to DERS/DEP, ATCO Gas requires an exemption from section 10 of the *Gas Code Regulation*.

The present Application is made by ATCO Gas pursuant to section 41(1)(a) of the *Gas Code Regulation*, which authorizes a gas distributor to apply to the Board for an exemption from all or any provision of the regulation. Sections 41(2)(a) and 42(3) establish the Board's discretion in relation to an exemption application in the following terms:

(2) The Board must not approve an exemption or an alternative compliance plan unless the Board is satisfied that it is in the public interest to do so **and** that

- (a) any exemption does not significantly affect the obligations of the applicant, or that the obligations can be or will be met in other ways ...

³ Decision 2003-040 – ATCO Group, Affiliate Transactions and Code of Conduct Proceeding, Part B: Code of Conduct, dated May 22, 2003, pp. 37-38

- (3) The Board may approve an exemption or alternative compliance plan with or without changes and with or without conditions and the exemption or alternative compliance plan remains in effect for the period of time specified by, or until revoked by, the Board.

In the Board's view, its discretion to exempt an applicant from a provision of the *Gas Code Regulation* comprises a two-part test. First, the Board must be satisfied that the exemption is in the overall public interest. Second, the Board must be satisfied that the exemption does not significantly affect the obligations of the applicant or that those obligations can otherwise be met.

With respect to the first part of the test, the Board considers that it should have regard to the purposes of a code of conduct as expressed in Decision 2003-040, since these purposes also, in the Board's view, clearly inform the *Gas Code Regulation*.

With respect to the second part of the test, to the extent of any impairment of an applicant's obligations under the *Gas Code Regulation*, the Board considers that its ability to attach conditions to any exemption pursuant to section 42(3) will ensure that those obligations can be effectively met in other ways. In the present circumstances, since the requested exemption would effectively authorize ATCO Gas to avoid its obligation not to disclose customer information without consent, the Board's primary concern is to determine whether customers' interests in the confidentiality of their information for purposes of the *Gas Code Regulation* can otherwise be protected.

4 PUBLIC INTEREST

4.1 Potential Harm

Views of the Intervenor

Calgary

Calgary submitted that there was a substantial risk of harm to both the regulated customers and retail competitors. The risk arose from the potential for inappropriate use of confidential customer information without any prospective benefit. Calgary argued that there was no evidence on the record to substantiate that the exemptions were in the public interest or that alternative measures to secure the objectives of the *Gas Code Regulation* were in place to protect the privacy of customer information. Calgary submitted that the burden of proof fell to the Applicant and could not be discharged by anecdotal evidence or motherhood statements of intention.

AUMA/CE

AUMA/CE submitted that the Board is charged with the responsibility to ensure that the confidentiality and propriety of customer information is properly protected. AUMA/CE suggested that the federal *Personal Information Protection and Electronic Documents Act*⁴ (PIPEDA) must also be considered in the deliberations of the Board.

AUMA/CE asserted that there was no harm to customers if the exemption was not granted and yet customers could be harmed if the Application was granted. AUMA/CE argued that

⁴ SC 2000, c. 5

confidential information may be misused to intrude upon a customer's privacy, affect their credit rating or cause other intended or unintended impacts on their ability to earn a living or purchase goods and services. AUMA/CE noted the lack of punitive measures or sanctions in place to deter or prevent potential harm to customers.

The AUMA/CE also noted the possible harm to DERS should other retailers be able to sign-up the customers of DERS prior to DERS commencing operations or should Board decisions regarding the ATCO retail sale and the DERS rates proceedings not be issued in a timely fashion to allow ATCO and DERS to complete the transfers as requested, assuming a favourable decision. In noting these possibilities AUMA/CE submitted that these harms were unlikely.

AFREA et al.

The Alberta Federation of REA's Ltd., the Alberta Association of Municipal Districts & Counties, the Alberta Irrigation Projects Association, the Consumers Coalition of Alberta and the Public Institutional Consumer of Alberta (AFREA et al.) submitted that the approval of the Application would harm customers as well as set a precedent of significant impact to both customers and other retailers. AFREA et al. emphasized that customers rely on the Board's scrutiny to uphold the standards and conditions set forth in the *Gas Code Regulation*. The potential impact of providing an unfair competitive advantage in the market erodes the level playing field and competitive market place.

AFREA et al. submitted that the procedures to protect confidentiality of customer information would most likely result in a level of intermingling of unregulated and regulated staff and divisions that will have access to the confidential data. AFREA et al. argued that none of these procedures would be subject to an independent audit, nor would they be subject to the *Gas Code Regulation*.

Views of ATCO

ATCO submitted that potential harm would only be realized in the event that the requested information was not adequately controlled and protected. ATCO submitted that this risk was not material. ATCO also submitted that the approval of the Application would have no impact upon the fair, efficient and openly competitive operation of the market.

ATCO provided assurances that it would not release the data to DEML until ATCO was satisfied that the data would not be used for any purpose other than system testing and data quality review, and with the necessary protocols to delete the data should the closing of the proposed transaction not occur. ATCO stated that they would require an Officer's Certificate from the Vice-President, Regulatory Affairs at DEML. ATCO also maintained that ATCO reserved the right to audit DERS and DEP to ensure that the data had been destroyed in this event.

ATCO submitted that DEML's letter dated September 9, 2003 outlined commitments made by DEML to ensure customer information and data were kept confidential. These commitments included written undertakings by individuals having access to the data stating that they would not provide data to other individuals within or outside DEML.

ATCO asserted the fact that compliance plans are not yet approved is of no relevance to ATCO/DEML's commitment to compliance. ATCO stated that the companies are committed to having the requisite approvals in place prior to an affiliated retailer providing retail service.

4.2 Necessity of the Application

Views of the Intervenor

Calgary

Calgary submitted that the burden of proof is an essential evidentiary requirement of the applicant that cannot be discharged without solid supportive evidence. Calgary further submitted that there must be evidence of necessity for the granting of an exemption on the balance of convenience, which is in the public interest. Calgary submitted that there was no cogent evidence on the record to suggest that exemptions were necessary and in the public interest or that alternative measures to secure the objectives of the *Gas Code Regulation* are in place to protect the privacy of customer information.

AUMA/CE

AUMA/CE submitted that ATCO's request was driven primarily as an application of convenience rather than an application of necessity. In support of this submission AUMA/CE included the following:

- The provision of customer information was not a pre-condition to closing.
- In its letter to ATCO dated September 9, 2003, DERS stated if approval was delayed until the close of the Retail Sale transaction, the system work will need to be done concurrently with the "challenges of absorbing the ATCO business operation, a situation Direct Energy Regulated Services very much wishes to avoid". AUMA/CE stated that avoidance of additional challenges supported an argument for convenience, not necessity.
- DERS is not new to the retailer service and billing environment and therefore should have commenced testing of systems at an earlier date, allowing for the testing of sensitive data after an approval of the Retail Sale Application.

Views of ATCO

ATCO took the position that the need, or necessity, to test the system prior to the close of the proposed sale would not be known until the system had been fully tested. ATCO contested that the issue of necessity was not the issue, but whether or not the Application was in the public interest.

In support of DERS, ATCO noted that Alberta customers had experienced difficulties with data transfer issues in the past leading to high levels of dissatisfaction. ATCO submitted that DEML and ATCO wanted to adopt all measures possible to avoid even the potential for similar problems. ATCO claimed that doing so would benefit both DERS and customers.

4.3 Testing/Use of "Real World" Data

Views of the Intervenor

Calgary

Calgary submitted that neither ATCO nor DEML gave any information regarding the testing procedures to be used with the requested customer information. Calgary further submitted that the information files requested by DEML were inconsistent with the stated reasons for testing,

and yet ATCO and DEML had not provided any details as to why it needed the specific information. Calgary submitted that ATCO, in its IR responses, demonstrated a disregard for the Board process and was in violation of the Applicant's obligation to provide information in support of its case. In particular Calgary asserted that there was no need for unmasked Site ID data to conduct the tests.

Calgary submitted that there was no evidence on the record to suggest any value to Phase 2 testing or that Phase 2 testing had to occur before Board approval or the closing of the transaction. Calgary submitted that neither ATCO nor DEML had presented any evidence to suggest that the existing data, as stored and managed by ATCO, was deficient and full of potential errors. Calgary argued that there was no evidence to suggest that DEML has a superior system to ATCO such that any existing errors or mistakes in the data could be discovered and/or corrected retroactively.

Calgary further submitted that billing systems are not being tested, as suggested by DEML in citing the EPCOR/Aquila precedent as reason for caution. Calgary noted ATCO's response to BR-ATCO 4(a) where ATCO stated that the DERS or DEP billing systems were not being tested. Calgary noted that it is the DEML internal system that is being tested. Calgary submitted that the evidentiary record is lacking essential detail to assist in the discovery of the nature and extent of testing to be undertaken.

Calgary noted that DEML's claims that testing would "allow Direct Energy Regulated Services to refine its load forecasting methods ...[and] allow it to optimize its supply portfolio" were unsubstantiated and had little merit in making a case for the transfer of sensitive data. Calgary argued that DEML had not made a case for obtaining the specific files noted in DEML's letter to ATCO dated September 9, 2003 and outlined in Appendix A to this Decision. Calgary further claimed that DEML's assertion that it "does not desire this information for marketing efforts and undertakes not to use the information provided for this purpose" had no meaning in light of the lack of a bond or other measure of support.

AFREA et al.

AFREA et al. suggested that the primary reason for accessing customer data was the testing of load forecasting systems, and further to prepare a tariff for default supply in advance of closing the Retail Sale. AFREA et al. submitted that the need to test load forecasting systems did not warrant the premature release of confidential, detailed customer data. As well, AFREA et al. submitted that the threat of extensive billing errors was unjustifiable based on ATCO submissions regarding data accuracy within the ATCO systems and the ATCO methods for identifying and correcting discrepancies.

AFREA et al. also submitted that testing the capability of DEML's system to process large volumes of data was unwarranted. AFREA et al. noted DEML's statement, as one of the reasons that the sale application should be granted, that the Board and customers could rely on DEML's retail experience in other jurisdictions to have a level of confidence in their IT system. AFREA et al. argued that DEML has large volume customer data bases in use within its corporate structure, and therefore, should not require the download of actual confidential data from ATCO for testing.

Views of ATCO

ATCO submitted that essential information systems should be tested with "real world" data and allow the new (non-ITEK) DERS systems to accurately segment the customer base. ATCO noted both that such a real world method of system testing was currently used by ATCO, and that DEML had requested the minimum data required. ATCO was of the belief that DERS should have the same opportunity to test systems prior to assuming the roles of DSP and Default Supplier.

ATCO stated that replication of real world data errors would not be adequate, and only actual data would ensure that the information systems could handle the volume of data necessary. ATCO submitted that the experience of ATCO and DEML dictated the necessity and appropriateness of real world testing.

In regards to data quality issues ATCO acknowledged that it did not know of any errors in the data at that time, however, ATCO noted that a dataset of such magnitude was unlikely to be error free. ATCO submitted that the list of possible errors is extensive. ATCO agreed with DEML that actual site ID information is necessary to test those fields, and stated that DEML had no basis to conclude that the data would be free of data quality problems. ATCO submitted that Phase I and Phase II data testing may provide benefits to customers in the way of reduced billing inaccuracies.

4.4 Timing of the Proposed Testing

Calgary

Calgary noted a lack of evidence respecting the specific testing protocols and timing requirements. Calgary submitted that DEML's statements regarding the time required for testing were impossible to reconcile. Calgary's concern stemmed from DEML's September 9, 2003 letter to ATCO where DEML stated that it would need six weeks followed by a few weeks to make the necessary changes to its systems. Later in its October 31, 2003 letter concerning the GUA Compliance Plan application DEML stated that "whether or not DERS receives the ATCO Gas...information before the anticipated December 1, 2003 regulated service commencement date, it would ensure it has completed all necessary system testing necessary." Calgary also noted that the start date for DERS is dependant on EUB decisions in other proceedings.

AUMA/CE

AUMA/CE's submission concurred with that of Calgary in regards to the timing and the necessity of the exemption requested. AUMA /CE submitted that ATCO did not meet their burden to convince the EUB of the need to access vital customer information without customer consent and the appropriate Board approvals.

ATCO

ATCO took the position that the testing of the requested data at the earliest possible date was in the public interest. ATCO asserted that DERS preferred to receive the data at the earliest opportunity to provide as much time as possible to avoid potential problems to both DERS and customers.

ATCO acknowledged DERS's indication that, whether or not DERS received the requested information prior to the anticipated December 1, 2003 regulated service commencement date, it

would ensure the completion of all necessary testing. ATCO emphasized that DERS wished to avoid system work when DERS was working through challenges involved with absorbing the ATCO business operation.

ATCO also argued against AUMA/CE's assertion that system testing should have or could have begun at an earlier date, as the Application was filed well before the development of the information systems in question. ATCO replied that, at that time, the extent of the required testing would not have been known. Similarly ATCO disputed the suggestion of AFREA et al that the proposed transfer of data was not warranted due to the provision of a customer transition period. ATCO submitted that system testing was not intended to form part of the transition process, but that it was understood that systems would have been tested and fully operational at the time of transition.

ATCO discussed the potential harm in relation to the timing of Board decisions, and suggested that the proposed start date for DERS's operations was at increased risk should testing remain outstanding. ATCO submitted that such a timing risk incurs substantial delay costs accrued by DERS, and would impact both DERS and customers.

4.5 Views of the Board

As set out in Section 3 of this Decision, the Board considers that its primary obligation is to ensure that the public interest reflected in the *Gas Code Regulation* is upheld in any request for an exemption. In the Board's view, it must protect the rights of customers while recognizing the interests of regulated gas distributors, their authorized default supply providers and/or affiliated retailers in the development of a competitive market place. The public interest must be evaluated in terms of potential harm and balanced against the potential benefits arising from an exemption. In the Board's view, if it is reasonably satisfied that customers would be exposed to harm by the exemption and conditions cannot be attached to the exemption to effectively mitigate the harm, the Board ought not to grant the exemption unless the Board is equally satisfied that some overriding public benefit will be realized. The Board does not consider that mere convenience will justify an exemption.

The Board notes that all parties recognized the potential harm of transferring confidential customer data to DERS in advance of approvals appointing DERS as DSP. In the Board's view, it must consider the harms and benefits associated with both Phase 1 and Phase 2 of the Application as proposed by ATCO.

With respect to the question of whether or not the provision of data is necessary, the Board is of the view that such necessity must be evaluated in relation to potential harm. ATCO has not provided sufficient evidence to prove that the applied for exemptions are, strictly speaking, necessary for customers. The Board agrees with AUMA/CE and Calgary that the Application was driven primarily by convenience for DERS and DEP. The proposed testing will not be done on customer billing systems, which have a direct effect on customers, but on the DERS energy management system. The Board does not find that avoidance of the challenges involved in absorbing the ATCO business operation supports the transfer of otherwise confidential customer data, especially in light of the potential harm from transferring such data. The Board, however, does appreciate that ATCO and DERS would prefer to avoid potential problems during a transition period should the Retail Sale be approved. The Board recognizes that fewer data and transitional problems would benefit customers in a more seamless transition between providers.

Further, the Board does note the potential of a delayed start date for DERS should required systems not be operational.

The Board finds that ATCO and DEML provided insufficient evidence with respect to the timing of the proposed data transfer and the use of 'real world' data. The Board notes the lack of information provided in IR Responses intended to clarify the timing of tests required in Phase II. However the Board does allow that, to achieve a smooth transition, DERS would benefit from the testing of data prior to the close of sale. The Board is satisfied on the basis of the material presented in the Application and IR Responses that customers will benefit if DERS has an opportunity to achieve a more seamless transition through reduction of potential data and system errors. The Board is also satisfied that the potential harm to customers from the release of customer information to achieve this transition can be effectively mitigated so that the public interest reflected in the *Gas Code Regulation* is respected.

With respect to Phase I, the Board is satisfied that the scrambling of the Site ID Code will mitigate the harm associated with releasing customer information since DERS/DEP will be unable to use the transferred data to identify customers. In that way, the Board considers that the objective of the requirement of the *Gas Code Regulation* to maintain the confidentiality of customer information will continue to be achieved. The Board is also of the view that it would be in the public interest for DERS/DEP to have an adequate opportunity to ensure that their systems will operate as required prior to closing of the Retail Sale and that customers will ultimately benefit by a smoother transition from ATCO to DERS. For these reasons, the Board concludes that it is in the public interest to grant the exemption requested in the Application in accordance with the Phase 1 proposal.

The Board is not, however, persuaded that it would be in the public interest to authorize the release of information as proposed in Phase 2. In the Board's view, the potential harm to which customers are exposed through the provision of Site ID Codes to DEML is substantial. The Board has not been provided with sufficient evidence either of the need for such a step beyond Phase I or of how the risk of harm can be effectively mitigated. Moreover, the Board has not been persuaded that any benefit to customers outweighs the significance of the potential for inappropriate use or misuse of confidential data. For these reasons, the Board denies the request for exemption contemplated by Phase 2.

5 CONDITIONS

Views of the Intervenors

Calgary

Calgary noted that one of the greatest concerns with the Application is the security of the data that is to be transferred. Therefore Calgary recommended that, should the Application be approved, the following conditions should be imposed.

- **Bonding:** Calgary submitted that the undertakings offered by DEML with respect to bonding are inadequate. Calgary stated that, should DEML fail in its undertakings, DEML would be unaffected but customers would be placed at risk. Calgary suggested that there should be bonding requirements placed on both DEML and ATCO. Calgary

recommended that there would be greater incentive for DEML to act in the regulated customers' interests if the bond was set at eight figures.

- Identification of testing procedures: Calgary recommended that, as a condition of any approval with respect to the Application, all testing procedures should be clearly identified in advance.
- Identification of testing personnel: Calgary noted that certain employees of DEML may have been hired for the services of both DERS and unregulated affiliates. Therefore it is important that this set of employees be limited to only those that are actually required to perform testing for the purposes of the regulated entity, DERS. Calgary noted that in this manner there will be clarity with respect to accountability should there be any mishaps. Calgary recommended that all of the DEML employees who are to be engaged in testing the data should be known in advance together with their job description.
- Affidavit from all testing personnel: Calgary further recommended that all personnel involved in testing confidential data be required to sign a sworn affidavit that clearly states that the customer information would not be used in any way for the benefit of the unregulated affiliates of DERS. Calgary noted that this is a common practice in dealing with confidential information before the Board.
- Data recovery procedures: Calgary stated that, in the event that the retail sale application is not approved or if the deal doesn't close for other reasons, there is considerable risk that information would be in the hands of an entity or entities, which have not been approved to have such information outside of an exemption in this proceeding. Calgary suggested that the exemption should terminate under these scenarios. In that event there should be procedures regarding the recovery and destruction of data in the possession of DEML. Calgary recommended that procedures be designed to assure the proper recovery and destruction of that data.

AUMA/CE

With respect to the assurances made by DEML that customer information will be kept confidential, AUMA/CE submitted that further checks and balances are warranted. AUMA/CE recommended that each of ATCO, DERS and DEP should provide a sworn Officer's Certificate from their appropriate representative. The Officer's Certificate should state the specific steps taken to maintain confidentiality and that all efforts have been and will be made to keep the customer information provided to DERS and DEP confidential. AUMA/CE also recommended that a similar sworn declaration be provided by each individual having access to any confidential customer information.

A further condition recommended by AUMA/CE was that DERS and DEP should file a copy of the written undertaking and the specific sanctions that will be imposed on individuals who may breach the terms and conditions imposed on the access to the data.

In the event that the transfer between ATCO and DERS and/or DEP does not take place, AUMA/CE stated that it appeared that the proper protocols regarding how the data would be handled were not in place for all parties. AUMA/CE submitted that ATCO, DERS and DEP should provide an Officer's Certificate giving assurances that the proper protocols are in place for all parties.

AUMA/CE also recommended that a bond be posted that is sufficiently large to provide a strong and clear message to all parties and employees of the consequences of violating a customer trust. AUMA/CE suggested that this would prevent any party from compromising confidential customer information. AUMA/CE suggested that ATCO, DEML and DEP should be required to provide immediate notice to the Board of any breach of the conditions that comes to their attention.

AUMA/CE submitted that ATCO, DERS and DEP should provide Officer's Certificates stating that they will not and have not violated any of the provisions of PIPEDA. Lastly, AUMA/CE recommended that, if the exemptions are approved, the duration should be limited to the time until the Retail Sale decision is issued and ATCO and DEML have completed the transfers. AUMA/CE stated that at that time there will no longer be a need to require the exemptions pursuant to the *Gas Code Regulation*.

Views of ATCO

ATCO stated that the commitments made by DEML make it unnecessary for conditions to be imposed on the approval of the Application. ATCO submitted that the commitments made by DEML would ensure that the obligations of ATCO under the *Gas Code Regulation* would not be significantly affected or will be met in other ways.

ATCO noted that the test for exemption contains a specific threshold that requires that the applied for exemption must not "significantly affect" the obligations of the applicant or that the obligations can be met in other ways. ATCO submitted that the objective is to ensure that the protections afforded under the *Gas Code Regulation* are maintained. Therefore ATCO argued that there is no need to impose conditions on an approval that go beyond the protections provided in the *Gas Code Regulation*.

The conditions that ATCO was most opposed to were:

- Officer's Certificates stating that PIPEDA will not be violated
- Bonding
- Identification of Testing Procedures

With respect to the condition respecting PIPEDA, ATCO submitted that there is no basis to suggest that provisions of the PIPEDA statute may be violated. Nor is there any basis to suggest that ATCO, DERS, and DEP provide Officer's Certificates stating that they will not violate and have not violated any of the provisions of PIPEDA. ATCO stated that the proposed transfer of information will not be subject to PIPEDA.

ATCO argued that bonding, as indicated by DEML would not ensure that the data is treated in a more confidential manner. ATCO noted that there is no similar requirement under the *Gas Code Regulation* to ensure compliance.

ATCO also argued that for a similar reason, identification of testing procedures has no value. ATCO stated that DEML is in the best position to determine its testing requirements as well as the information that it needs to do so.

Views of the Board

Without the approval of Phase 2 of the Application, the Board considers that the need for conditions to be attached to the exemption is lessened. ATCO has provided assurances that it will not release data to DEML until ATCO is satisfied that the data will not be used for any purpose other than system testing and data quality review and until ATCO is satisfied with the protocols necessary to delete the data if the Closing of the proposed transaction does not occur. ATCO also noted that it will require an Officer's Certificate from the Vice-President of Regulatory Affairs at DEML and reserved the right to audit DEML to ensure that the data has been destroyed.

The Board notes that all parties recognize and understand the importance of keeping customer data secure and confidential. The *Gas Code Regulation* addresses the importance of protecting customer information. The Board is allowing the exemption so that the information requested in Phase 1 of the Application can be provided by ATCO to DERS and DEP. The Board considers that the risk to Customers is minimized by only approving Phase 1 of the Application. The Board is however concerned that some risk is created in allowing the Phase 1 information to be passed to DERS and DEP in the event that the transfer of the retail business from ATCO to DERS does not take place.

Therefore, in the event that the transfer of the retail business from ATCO to DERS does not occur, the Board directs ATCO to provide to the Board and registered Intervenor detail as to how the data provided has been disposed of properly.

Further, to emphasize the importance of protecting customer information and in the interest of exercising caution, the Board agrees that it would be appropriate to impose a condition similar to that recommended by Calgary regarding an affidavit from all staff who will deal with the customer data. The Board does not consider that the imposition of this condition will create any extra burden for ATCO or DEML, but will effectively emphasize the importance of maintaining customer confidentiality.

Therefore, the Board directs ATCO to obtain a sworn affidavit from all DERS or DEP staff who will be dealing with the customer data, confirming that they will only use the data for the express purpose of the testing contemplated by the Application and not for any other purpose.

6 SUMMARY OF BOARD DIRECTIONS

This section is provided for the convenience of readers. In the event of any difference between the Directions in this section and those in the main body of the Decision, the wording in the main body of the Decision shall prevail.

1. Therefore, in the event that the transfer of the retail business from ATCO to DERS does not occur, the Board directs ATCO to provide to the Board and registered Intervenor detail as to how the data provided has been disposed of properly. 14
2. Therefore, the Board directs ATCO to obtain a sworn affidavit from all DERS or DEP staff who will be dealing with the customer data, confirming that they will only use the data for the express purpose of the testing contemplated by the Application and not for any other purpose. 14

7 ORDER

FOR AND SUBJECT TO THE REASONS AND DIRECTIONS SET OUT IN THIS DECISION, IT IS HEREBY ORDERED THAT:

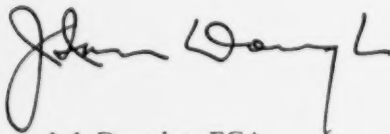
- (1) The request by ATCO Gas for an exemption under section 41(1)(a) of the *Code of Conduct Regulation* under the *Gas Utilities Act*, described as Phase 1 of the Application, is granted.
- (2) The request by ATCO Gas for an exemption under section 41(1) (a) of the *Code of Conduct Regulation* under the *Gas Utilities Act*, described as Phase 2 of the Application, is denied.

Dated in Calgary, Alberta on November 25, 2003.

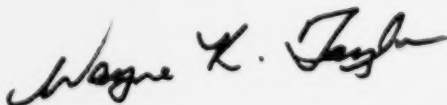
ALBERTA ENERGY AND UTILITIES BOARD



B. T. McManus, Q.C.
Presiding Member



J. I. Douglas, FCA
Member



W. K. Taylor
Acting Member

APPENDIX A – IDENTIFIED DATA REQUESTED

Direct Energy Regulated Services requests the following data be made available. The term of the data requested is for the last (12) months, from August 1, 2002 to July 31, 2003.

Site Extract File (One for gas, another for power):

- Site_ID (a unique code)
- Customer_Account_ID (a unique code, not a name)
- Postal_Code
- SSC_Profile_Class
- SSC Loss Group Code
- Site energized status and effective dates
- Current Rate (e.g. RRO, Default Supplier)

Note: Direct Energy Regulated Service is not requesting any information related to ATCO Gas or ATCO Electric customers who are currently being served by a competitive retailer.

Usage Extract File (One for gas, another for power):

- Site_ID (a unique code)
- Customer_Account_ID (a unique code, not a name)
- Meter_Read_Start_Date
- Meter_Read_End_Date
- Volume
- Volume_Unit
- (for power provide in DCM and DIM format)

Site Identification Code Issue

Direct Energy Regulated Services and Direct Energy Partnership ultimately require the Site Identification code to undertake the testing described above. The sensitivity of the issue is recognized, as the identity of the customer can be determined from knowledge of this code. To reflect this concern, a two phase approach is requested by Direct Energy Regulated Services and Direct Energy Partnership.

- Phase 1. Customer information is released by ATCO to Direct Energy Regulated Services and Direct Energy Partnership with the Site ID scrambled or altered to preserve customer anonymity. Scrambling or altering of the Site ID will be accomplished by ATCO utilizing a secret computer algorithm.
- Phase 2. No earlier than November 1, 2003, ATCO will provide the 'key' to the scrambling algorithm to allow Direct Energy Regulated Services and Direct Energy Partnership to obtain the true Site ID.

The customer benefit obtained by the Authority allowing Direct Energy Regulated Services and Direct Energy Partnership to access the Site ID information is as follows.

- (a) While it is useful to deal with the customer information on an aggregate level, this level of information is not adequate for gaining knowledge of specific customer historical consumption data issues. Within the ATCO database of customer information are an unknown number of customers with errors or omissions in their customer history. The list of possible errors is extensive and includes incorrect rate codes, meter multipliers, demand levels, retailer identification, municipal codes, and many others. It is an axiom that poor billing history information equates directly to incorrect billing. This does not suggest, in any manner, that the ATCO database is fraught with errors. The ATCO database is simply unknown to Direct Energy Regulated Services and Direct Energy Partnership, and prudence dictates that specific customer historical consumption information must be reviewed and assessed. Direct Energy Regulated Services and Direct Energy Partnership therefore request customer information on a Site ID level to identify those customers with such discrepancies and flag them for correction immediately after the close of the Retail Sale. If this information is not available prior to the date of the Retail Sale, there will be a time lag between Direct Energy Regulated Services and Direct Energy Partnership assuming responsibility for these customers and the date upon which any customer data issues are identified and corrected. There is every potential for the customer to receive an incorrect bill in the interim, an occurrence that Direct Energy Regulated Services and Direct Energy Partnership wish to avoid.
- (b) After the closing of the Retail Sale, the migration of RRT customers from ATCO to Direct Energy Regulated Services and migration of Default Supply customers to Direct Energy Partnership will immediately commence. Migration will occur over a month long period until all eligible customers are transferred. The issue that Direct Energy Regulated Services and Direct Energy Partnership must deal with is that without knowledge of the complete list of customer Site IDs and which specific customers are under the RRT before the closing of the Retail Sale, neither Direct Energy Regulated Services nor Direct Energy Partnership will know if all customers, or even the correct customers, have been transferred. Should customers have been omitted or incorrect customers transferred, this will again result in incorrect bills being produced.

APPENDIX B – INTERVENORS

Principals and Representatives (Abbreviations Used in Report)

ATCO Gas

K. Illsey

Alberta Federation of REA's Ltd., Alberta Association of
Municipal Districts & Counties, the Alberta Irrigation
Projects Association, the Consumers Coalition of Alberta and
the Public Institutional Consumer of Alberta (AFREA et al.)

K. Sisson

Alberta Urban Municipalities Association/City of Edmonton
(AUMA/CE)

R. McCreary

City of Calgary

B. J. Meronek

